NO. 87-526
IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

BOBBY FELDER,

Petitioner,

v.

DUANE CASEY, et al.

Respondents.

ON WRIT OF CERTIORARI
TO THE WISCONSIN SUPREME COURT

BRIEF OF AMICUS CURIAE STATE OF SOUTH DAKOTA

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INTEREST OF THE AMICUS CURIAE

South Dakota is keenly interested in the outcome of this case for two separate reasons. First, South Dakota has a interest in managing its judicial system for the benefit of all its citizens. Within our federal framework, it is imperative that a state's ability to manage its governmental affairs on behalf of its citizens remain intact.

Second, South Dakota has an interest in maintaining the validity of its notice of claims statutes. Those statutes allow claimants ample time in which to give notice of potential claims against a governmental entity, to that entity, while allowing it a reasonable opportunity to investigate the claims and prepare proper responses.

On the basis of these responsibilities to its citizens and itself, South Dakota submits the following argument in support of Respondents and also joins in the arguments of the Amici Curiae Brief filed by the Attorney General of Wisconsin.

SUMMARY OF ARGUMENT

Our federal system recognizes the concurrent jurisdiction of federal and state courts. It further recognizes a citizen's right to pursue a federally-created claim in state court. That system, however, also recognizes a state's right to manage its own

judicial system. Throughout our nation's and this Court's history, a course of action has developed that balances the federal government's strong policy interest in securing federal rights to citizens against the equally important rights of states to limit actions pursued within their respective courts, including limitations on federally-based claims.

Most of the case law reviewing state limitations on federal claims in state courts has grown from the Federal Employers' Liability Act (FELA). The original federal statutes assumed concurrent jurisdiction for cases arising under the Act. The 1910 amendments further strengthened that assumption. (Those amendments also provided that then state-controlled removal procedures remained intact for non-FELA cases.)

A continuing procession of FELA cases contained this Court's determinations

regarding when and how a state could restrict the pursuit of FELA claims within its court system. Two basic restrictions placed on state control of jurisdiction mandate that limitation statutes not discriminate against individuals and that they not apply exclusively to federal claims or other federally-based actions. On the other hand, state courts may utilize the doctrine of forum non conveniens and other procedural rules based on valid, reasonable state policy. Thus, a balancing test between strong federal policy and valid state interest has come about.

More recently, this balancing test has been applied in cases arising under federal civil rights statutes. (42 U.S.C. §§ 1981, 1983, and 1988.) While most of these issues involve application of state law within the federal court system rather than in state

courts, the same balancing test has been utilized.

In the instant matter, there is no question that the federal government has a strong policy interest in protecting its citizens' civil rights. Nonetheless, states have a strong counterbalancing interest in remaining able to impartially utilize reasonable limitation statutes within their respective jurisdictions. Notice of claim statutes are representative of such strong state procedural and jurisdictional interests, thus making this case both representative of and critical to the issue. Here, Wisconsin's notice of claim statute has not been applied in a discriminatory manner. Further, the statute has placed no onerous duty on the Petitioner. The Petitioner was not unduly restricted in presentation of his claim, nor is he barred from pursuing that claim in federal court. Application of the balancing

test must weigh in favor of states' interest in pursuing jurisdictional rules, as represented in state notice of claims statutes.

ARGUMENT

IT DOES NOT VIOLATE FEDERAL POLICY FOR A STATE TO APPLY ITS NOTICE OF CLAIMS STATUTE AS A CONDITION PRECEDENT TO STATE COURT SUITS BROUGHT UNDER 42 U.S.C. § 1983.

An individual's right to assert a claim arising under federal law within a state's judicial system has been debated since the inception of our nation's federal system. Freedom of state courts to enforce federally-created rights was first articulated by Alexander Hamilton in The Federalist No. 82. States' rights advocates initially argued in favor of applying federal law in state courts as a means to retard feared federal

assumption of power.[1] The debate played an important role in the Act of September 24, 1789, ch. 20, § 9, 1 Stat. 77, which granted concurrent jurisdiction to federal and state courts.

The earliest definitive statement by this Court concerning concurrent jurisdiction came in Claflin v. Houseman, 93 U.S. 130 (1876). Giving credence to Hamilton's "usual analytical power and far-seeing genius," this Court said:

> So rights, whether legal or equitable, acquired under the laws of the United States, may be prosecuted in the United States Courts, or in the State Courts, competent to decide rights of the like character and class; subject, however, to this qualification, that where a right arises under a law of the United States, Congress may, if it see fit, give to the

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[1] By the early 1800's, those same advocates had reversed their position, now fearing that state court systems would be overwhelmed by federal judicial matters.

Federal Courts exclusive jurisdiction.

Id. at 136-137. State courts, when granted jurisdiction under the laws of their respective states and when able to entertain a similar state claim, could hear federal rights cases, unless otherwise specifically dictated by Congress. There existed no assumed jurisdiction for federal rights cases in state courts; presumably, a state could restrict its courts' jurisdiction to hear those cases.

The lion's share of the historic body of law examining a state's ability to restrict federal claims jurisdiction involves the Federal Employers' Liability Act (FELA), 35 Stat. 65 (1908), as amended, 45 U.S.C.A. § 51, et seq. Charles Alan Wright, Law of Federal Courts, § 45 (3d Ed. 1976). The relevancy of the case law surrounding FELA cases has been questioned, however.

> [I]t should be borne in mind that the growth of the law in this area has been almost exclusively confined to state enforcement of the Federal Employers' Liability Act. This makes it difficult to generalize from the decisions, since they probably reflect the peculiar necessities of the statute.

Note, State Enforcement of Federally Created Rights, 73 Harv. L. Rev. 1551 (1959-60). Nonetheless, examination of FELA actions is necessary to provide insight into this issue.

The base FELA case(s) on issue is the Second Employers' Liability Cases, (otherwise known as Mondou v. New York, N.H. & H.R. Co.), 223 U.S. 1 (1912). In its dicta, this Court noted that concurrent jurisdiction had been codified in the General Jurisdictional Act, 25 Stat. at L. 433, ch. 866, § 1, U.S. Comp. Stat. 1901, P. 508. The Court further noted that an amendment to the original FELA legislation stated:

> The jurisdiction of the courts of the United States under this Act

> shall be concurrent with that of the courts of the several States, and no case arising under this Act and brought in any state court of competent jurisdiction shall be removed to any court of the United States.

Second Employers' Liability Cases, 223 U.S. at 56, citing and placing emphasis in the Act of April 5, 1910, 36 Stat. 291, ch. 143. Though it might already have been assumed by interested parties that FELA cases could be brought in state courts, this Court noted that the amendment added greatly to the basis for that assumption.[2]

Though the Second Employers' Liability Cases implied strongly that a petitioner

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[2] It may further be assumed by the language retarding removal of an action in state court to federal court that a state court's ability to control removal of non-FELA federal claims to federal court under the pre-1948 removal procedure remained alive and well. That interesting aspect of jurisdiction control by state-level authority held fast in non-FELA matters.

might mandate that his FELA rights case be heard in state court, language toward the end of the opinion appeared to recognize the possibility of state restrictions.

> We conclude that rights arising under the act in question may be enforced, as of right, in the courts of the states when their jurisdiction, as prescribed by local laws, is adequate to the occasion.

Second Employers' Liability Cases, 223 U.S. at 59. Clearly, local authorities could still restrain state court jurisdiction in federal matters.

The FELA claim case of Douglas v. New York, N.H.& H.R. Co., 279 U.S. 377 (1929), carried forward the arguments and points of the Second Employers' Liability Cases. The issue there arose under the Privileges and Immunities Clause of the United States Constitution. U.S. Const. art. IV, § 2. The plaintiff, a resident of Connecticut, sued the Connecticut corporate defendant in state

court in New York where the defendant was doing business. The New York courts declined the action. Ruling that the courts of New York would certainly be trusted and could be expected to abide by constitutional considerations, this Court went on to say, "A distinction of privileges according to residence may be based upon rational considerations and has been upheld by this Court . . . ." Douglas, 279 U.S. at 387.

In the Court's final statement, referencing the Second Employers' Liability Cases, Mr. Justice Holmes stated, "But there is nothing in the Act of Congress that purports to force a duty upon such Courts as against an otherwise valid excuse." Douglas, 279 U.S. at 388. That statement complies with the previous case's reference to state jurisdiction that arises under local law and adequately meets the litigants' needs. Though no definition was given for an

"otherwise valid excuse," it is clear that a state court might decline jurisdiction in an FELA case on the basis of some rational reason.

One example of an "otherwise valid excuse," as well as another Privileges and Immunities Clause (U.S. Const. art. IV, § 2) question, appeared in Missouri ex rel. Southern Ry. v. Mayfield, 340 U.S. 1 (1950). The issue there was the state's ability to accept or reject the doctrine of forum non conveniens in FELA actions. This Court stated:

> But if a State chooses to '(prefer) residents in access to often overcrowded Courts' and to deny such access to all nonresidents, whether its own citizens or those of other States, it is a choice within its own control. This is true also of actions for personal injuries under the Employers' Liability Act. (Citations omitted to Douglas, supra.) Whether a State makes such a choice is, like its acceptance or rejection of the doctrine of forum non conveniens, a

> question of State law not open to review here.

Mayfield, 340 U.S. at 4. Thus, another state jurisdictional restriction is available, so long as that restriction is applied fairly.

Referring to two prior decisions, the court continued:

> But neither of these cases limited the power of a State to deny access to its courts to persons seeking recovery under the Federal Employers' Liability Act if in similar cases the State for reasons of local policy denies resort to its courts and enforces its policy impartially, (citation to McKnett, below), so as not to involve a discrimination against Employers' Liability Act suits and not to offend against the Privileges-and-Immunities Clause of the Constitution.

Mayfield, 340 U.S. at 4. Matters of "local policy" may thus restrict state jurisdiction, again assuming impartial application.

The above-mentioned case of McKnett v. St. Louis and S.F. Ry. Co., 292 U.S. 230 (1934), held that states could not reject

jurisdiction over FELA claims simply because they arose under federal law.

> While Congress has not attempted to compel states to provide courts for the enforcement of the Federal Employers' Liability Act, (citation to Douglas, supra), the Federal Constitution prohibits state courts of general jurisdiction from refusing to do so solely because the suit is brought under a federal law. . . . A state may not discriminate against rights arising under federal laws.

Id. at 233-234. A state's refusal to hear an FELA claim on the basis of its federal origin was removed from the list of valid excuses.

Minneapolis and St. L. R. Co. v. Bombolis, 241 U.S. 211 (1916) is worth noting here. That matter hinged on the state's ability to apply jury rules contrary to federal requirements under the Seventh Amendment to the United States Constitution. U.S. Const. amend. VII. This Court held that mandatory application of federal

constitutional standards to state juries would be:

> [I]n conflict with an essential principle upon which our dual constitutional system of government rests; that is, that lawful rights of the citizen, whether arising from a legitimate exercise of state or national power, unless excepted by express constitutional limitation or by valid legislation to that effect, are concurrently subject to be enforced in the courts of the state or nation when such rights come within the general scope of the jurisdiction conferred upon such courts by the authority, state or nation, creating them.

Bombolis, 241 U.S. at 221.

The foregoing cases are illustrative of a growing "balancing test" between citizens' rights to pursue federal claims in state courts and the states' inherent interests and authority under the federal system to control access (jurisdiction) to those courts. It may be best stated as follows:

> It would seem, therefore, more realistic to view the problem as one of accommodation between the somewhat conflicting constitutional

> purposes of securing the effective enforcement of federally created rights in the manner which to Congress seems proper and, at the same time, maintaining the states as viable political units with the ability to direct the ends for which their judicial systems shall be used.

Note, State Enforcement of Federally Created Rights, 73 Harv. L. Rev. 1551, 1555 (1959-60).

This balancing has, in recent history, appeared in application of state law in the federal courts via Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).

Addressing a judge and jury conflict of laws question, this Court held in Byrd v. Blue Ridge Rural Electric Cooperative, 356 U.S. 525 (1958), a federal court case, that, "A State may, of course, distribute the functions of its judicial machinery as it sees fit." Id. at 536. In its dicta, this Court said that the probability that the outcome of the action might be affected by

"disregarding" the state procedure did not weigh, in balance, so heavily as to have the state rule override federal practice. This Court's holding was based primarily on South Carolina's minimal policy and management interests in the questioned rule; the state "requirement appears to be merely a form and mode of forcing the immunity, (citations omitted), and not a rule intended to be bound up with the definition of the rights and obligations of the parties." Id. at 536. Thus, federal interests may override state rules when those state rules do not express important state policies.

Two more relatively recent FELA cases involving jury rules and standards appeared, on the surface, to run contrary to Bombolis, supra, but both were predicated on a finding that a federal rights petitioner has exceptionally strong interests under federal jury policy. Dice v. Akron Co. & Y. R. Co., 342

U.S. 359 (1952); Wilkerson v. McCarthy, 336 U.S. 53 (1949). In Dice, this Court found a jury trial to be "part and parcel" of a petitioner's rights in an FELA action. Again, strong federal policy can outweigh, in the balance, a state's otherwise applicable procedural system and laws.

The case at bar involves one of several federal civil rights statutes. (42 U.S.C. §§ 1981, 1983 and 1988.) More often than not, the issue of the balance between a petitioner's federal rights and application of state law, particularly procedural law, has arisen in cases in federal court.

The nucleus of federal civil rights policy was stated in Monroe v. Pape, 365 U.S. 167 (1961), overruled on other grounds, 436 U.S. 658, 701 (1978).

> It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect,

> intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.

Monroe, 365 U.S. at 180.

Application of the balancing test between a state procedural statute analogous to the Wisconsin statute at issue and the strong federal policy interest in a citizen's civil rights appeared in Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975). There, a state statute of limitations was at issue.

> Although any statute of limitations is necessarily arbitrary, the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones.

Id. at 463-464. That "point" becomes the fulcrum of the balancing test. This Court

further noted, "Nor is there anything peculiar to a federal civil rights action that would justify special reluctance in applying state law." Id. at 464. This Court identified the balancing test, saying, ". . . considerations of state law may be displaced where their application would be inconsistent with the federal policy underlying the cause of action under consideration." Id. at 465. Ultimately, however, the Court found no policy reason that would excuse the plaintiff's failure to abide by the state statute of limitations. Id. at 466.

State law abatement of a federal civil rights case in federal court was the issue in Robertson v. Wegmann, 436 U.S. 584 (1978). Noting the balancing test, as expressed in Johnson, supra, the Court stated that, "Of particular importance is whether application of state law 'would be inconsistent with the federal policy underlying the cause of action

under consideration.'" Robertson, 436 U.S. at 590.

> Despite the broad sweep of § 1983, we can find nothing in the statute or its underlying policies to indicate that a state law causing abatement of a particular action should invariably be ignored in favor of a rule of absolute survivorship.

Id. at 590. Further:

> That a federal remedy should be available, however, does not mean that a § 1983 plaintiff (or his representative) must be allowed to continue an action in disregard of the state law to which § 1988 refers us. A state statute cannot be considered 'inconsistent' with federal law merely because the statute causes the plaintiff to lose the litigation.

Id. at 593. State procedural laws restricting federal rights claims are not necessarily overcome, even by strong federal policy.

Prior cases before this Court consistently hold that state time limitation on federal rights claims, within whichever jurisdiction, is acceptable. For example,

the New York statute of limitations tolling rule was not "inconsistent" with federal § 1983 policy because:

> [P]laintiffs can still readily enforce their claims, thereby recovering compensation and fostering deterrence, simply by commencing their actions within three years.

Board of Regents in University of State of New York v. Tomanio, 446 U.S. 478, 479 (1980). And this Court found "no need for nationwide uniformity." Id. at 479. Later, this Court characterized Tomanio, id.--citing Robertson, supra, Johnson, supra, and Monroe, supra--as holding that no federal § 1983 policy--be it deterrence, compensation, uniformity or federalism--is offended by a state's statute of limitations or by its rules governing tolling. Chardon v. Fumero Soto, 462 U.S. 650 (1983). The validity of applying the proper state statute of limitations to a federal civil rights action was

cemented in Wilson v. Garcia, 471 U.S. 261 (1985).

Petitioner may maintain that such approved state statutes of limitations are not analogous to the Wisconsin notice of claim time limitation on the basis that the statute does not fill a federal "deficiency." The true issue, however, is application of the balancing test between Petitioner's federal rights and the State's interest in managing its judicial system.

A notice of claim statute is both procedural and jurisdictional in nature. There is no question that a state has a strong interest in application of such statutes. This strong state interest is adequately expressed in the State of Wisconsin's amici curiae brief, so it will not further be discussed here.

On the other side of the balancing test, Wisconsin has not discriminated against

Petitioner's federal action; its courts applied its notice rule in the same manner to Petitioner's claims arising under state law. Further, there is no showing that Wisconsin has applied its rule in a discriminatory manner to Petitioner. All Petitioner had to do was to comply with the same notice statute as required of any other citizen bringing any tort claim against any governmental unit in the State of Wisconsin.

As Justice Frankfurter pointed out in his concurring opinion in Brown v. Gerdes, 321 U.S. 178, 190 (1944), where Congress provides for enforcement of federal rights in state courts, it must accept conditions for litigation in those courts as it finds them. The State of South Dakota and other states have legitimately required notice of claims as jurisdictional prerequisites to tort actions against governmental units and employees. This procedural and jurisdictional

policy is non-discriminatory and should not be overturned.

CONCLUSION

It is respectfully requested that the judgment be affirmed.

Respectfully submitted,

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